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SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

April 7, 2017

The Committee on Legal Services met on Friday, April 7, 2017, at 12:43 p.m. in HCR 0112. The following members were present:

Senator Cooke, Chair
Senator Gardner
Senator Guzman
Senator Holbert (present at 1:01 p.m.)
Senator Kagan (present at 12:49 p.m.)
Representative Foote, Vice-chair
Representative Herod
Representative Lee
Representative Wist

Senator Cooke called the meeting to order.

12:43 p.m. – Thomas Morris, Managing Senior Attorney, Office of Legislative Legal Services addressed agenda item 1 a - Rules of the State Board of Education, Department of Education, concerning the operation, maintenance, and inspection of school transportation vehicles, 1 CCR 301-26 (LLS Docket No. 160435; SOS Tracking No. 2016 00397).

Mr. Morris said I have some rules from the state board of education and they relate to the operation, maintenance, and inspection of school transportation vehicles. There are four issues and I understand that this is uncontested.

Bethanie Peck from our Office was also with me and spotted the issue and helped me write the first draft of the brief. The first of the four issues is incorporation by reference, the second issue relates to whether a rule is specific enough to not be void for vagueness, the third issue relates to a guide that was incorporated into the rule and whether that's acceptable, and the fourth issue is what we call a sin of omission or a rule that's supposed to include something but doesn't. The first issue is incorporation by reference. If you look on page 3 of the memo I've quoted the portion of the State Administrative Procedure Act (APA) that relates to incorporation by reference, section 24-4-103 (12.5)(a), C.R.S., and if you look at subsection (12.5)(a)(II) you'll see that to incorporate something by reference the rule has to cite the rule by the date, include the address of the agency where the standard is available for public inspection, state that the rule does not include later amendments, and then in subsection (12.5)(a)(IV) there's the requirement that the rule has to state where copies of the standard are available both from the agency who adopted the rule and where copies are available from the agency that originally issued the standard. If you look at Addendum A to the memo you'll see the list of several rules that made reference to the code of federal regulations, but those rules don't comply with the statute because they don't include the date in which those code of federal regulations were promulgated, where the code is available for public inspection, where copies of those codes are available both from the agency adopting the code and from the agency that originally issued the code. For that reason Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02 should not be extended.

Representative Lee said what is the implication or the consequence of either action? Mr. Morris said the APA says that every rule that is newly promulgated automatically is not extended unless the general assembly postpones the expiration of the rule acting by bill. Each year the general assembly has a Rule Review Bill, which is on your agenda today, and if the Committee agrees with the recommendation made by staff these rules would be amended into the bill and they would not be extended as of May 15. The Secretary of State would then take those particular rules out of the Colorado Code of Regulations (CCR). Representative Lee said so what are the consequences for the department of not having these rules continued? Mr. Morris said they would have to decide whether they wanted to address that through additional rule making. They could do an emergency rule making to get something in place quickly and then also notice a regular rule making that is on the full schedule. It takes longer to do a regular rule making. The emergency rule making has expedited procedures to get something in place in a shorter period of time. Representative Lee said so is there going to be a gap in the application of the rule during this period of time between our nonadoption and their decision to continue it or not? Is that a consequential impediment if it doesn't get

continued? Mr. Morris said I believe if the state board of education decided to adopt an emergency rule that they would have time to do this before May 15. They've known about this for months so they've been aware that this is coming. Representative Lee said I'm seeing heads from the department nodding affirmatively behind you so I'm comfortable.

Mr. Morris said the second issue starts at the bottom of page 3 of the memo and it is with regard to whether a rule is so vague that it is void for that reason. The APA requires that all rules be clearly and simply stated so that people can understand what they have to comply with. That is in section 24-4-103 (4)(b), C.R.S., and the relevant language is at the top of page 4 of the memo and it says no rule shall be adopted unless, to the extent practicable, the regulation is clearly and simply stated so that its meaning will be understood by any party required to comply with it. However, Rule 4204-R-15.03(e) fails to meet this statutory requirement. The rule says that all chemicals and cleaning supplies carried on a school transportation vehicle must meet the following precautions including that containers and quantities of products are kept to a reasonable size. I think we all know that reasonable minds may differ as to what is a reasonable size. Our conclusion is that the rule violates the APA and therefore should not be extended.

Senator Kagan said I'm just intrigued by this because I never knew that we had to have rules that were comprehensible and that the word "reasonable" was therefore not acceptable. And seeing the statute and seeing the rule I agree that this rule does not fulfill the statutory requirement and therefore I would indeed vote that the rule not be extended and will. I'm interested because we say things have to be reasonable all the time in statute, so laws don't have to be comprehensible and rules do? We say you've got to drive at a reasonable speed under the circumstances even if that's less than the speed limit and nobody knows what a reasonable speed under the circumstances is. You've got to exercise reasonable care and until the courts define it we don't know what reasonable care is. We have these vague standards in statute and we're allowed to do that in our laws, but we're not allowed to do that in our rules. I'm just intrigued by that because there are actual punishments for not complying with these vague laws but we're allowed to do it. I'm wondering whether it's ever come up and how this twin track, that rules have to be comprehensible but laws don't, what sort of background is that? I'm just asking out of academic interest. Mr. Morris said I do think that it is an interesting issue and I'll wade into waters where I'm perhaps not qualified and mention for a criminal sanction I think the statute does have to be a little but higher standard than just saying you have to be reasonable or that kind of thing. I think if there's a criminal sanction a court is likely to say that if you don't know what the prescribed conduct is it's pretty hard to send you to jail for it. I'll also say that in the context of rule making the

analysis is typically that there has to be sufficient standards when looking at the statute and the rule in conjunction together for the laws to apply to a person. If, for example, the statute said something like the commissioner shall adopt reasonable rules and then the commissioner adopts a rule that says everybody has to be reasonable, when you put those together you haven't gotten where you need to be. In this instance there is sort of general rule-making authority but then when the rule doesn't go any further than that. I think when you put them together there is a problem with the regulated entity knowing what is required. As the general assembly I think we have more leeway than an executive branch agency does.

Mr. Morris said the third issue is whether a guide that was referred to in a rule impermissibly sidestepped the requirements of the APA. At the bottom of page 4 of the memo you can see the statutory language that says whenever an agency is required or permitted by law to make rules this section is applicable and this section does not apply to statements of policy which are not meant to be binding as rules. If an agency is going to promulgate something that is intended to be binding it has to comply with the APA and one of the main requirements of the APA is that you have to give notice to the public, you have to hold a hearing, and you have to have an opportunity to submit comments. Those are the procedures that apply to rules. If you look at Rule 4204-R-18.01, it says that emergency evacuation drills shall be conducted following the procedures in the Colorado department of education School Bus/Multifunction Bus/Motor Coach Bus Operator Guide. If your school district is operating a school bus you have to do these drills and you have to comply with the procedures that are in the guide, therefore the guide becomes binding, therefore the guide fits the definition of a rule, therefore to promulgate the guide, which has this binding effect, the state board of education had to have followed the procedures of the APA with regard to adoption of the guide, which means public notice, a hearing, and all of those things. But it didn't do that with the guide. The guide is just something that it has and can change whenever it wants without any compliance with the procedural requirements of the APA. Therefore, our recommendation is that this rule violates the APA and should not be extended.

Representative Wist said this is unfortunately an issue that I've had a lot of experience with in public practice and my frustration with the federal department of labor and its enforcement powers for Occupational Safety and Health Administration (OSHA) and Mine Safety and Health Administration (MSHA) issuing interpretive guidance and it's not always a bright line in terms of what's interpretive guidance for enforcement officials in the field and what's rule making. I appreciate the sensitivity to where that line is and I think you draw it appropriately here. I think challenge becomes making sure that we're calling a rule a rule and looking at interpretive guidance as something separate

and apart from that because I know we give substantial discretion to the agency to carry out the statutory mission of the agency and promulgate rules within the statutory authority and to make rules that are clear, but I also think in some circumstances we've got to give the agencies some flexibility. Also I think it's helpful for those that are regulated to have some information in terms of how the rules would be interpreted. I appreciate the sensitivity and I just wanted to offer that for the record. Mr. Morris said I think I agree.

Mr. Morris said the final issue relates to what we call the sin of omission. In this case there is a statute quoted at the bottom of page 5 of the memo, section 22-51-108, C.R.S., which says that the state board of education shall promulgate rules for the administration of this article and such rules shall include the length of bus routes. The state board of education has promulgated rules to implement the article in question. Those were the rules that our Office review here. But those rules do not include anything about the length of bus routes. If you look at Addendum B, I have included the entirety of Rule 4204-R-17.00 that relates to route planning and student loading and discharge. This is the closest we could find in the rules the state board of education promulgated pursuant to this particular article that relate to the length of bus routes and it has a couple of sections that are more or less related to how school districts are supposed to handle their bus routing, picking up students, and transporting them to and from school. This is the logical place where they should have addressed the length of bus routes but did not and therefore our recommendation is that Rule 4204-R-17.00 not be extended.

House members left the hearing to return to the House floor for a vote which resulted in the Committee no longer having the quorum necessary to vote and therefore the Committee moved to a different agenda item that did not require a vote until the House members could return.

1:03 p.m. – Sharon Eubanks, Deputy Director, Office of Legislative Legal Services, addressed agenda item 4 - Update on the Status of the Budget for Office of Legislative Legal Services for FY 2017-18.

Ms. Eubanks said I just wanted to give you a very brief update in terms of our Office's fiscal year 2017-18 budget that you last approved in February. You might recall at that point in time the budget that you approved included funding for a 2.5% increase for salary survey and no increase for merit increases based on the governor's November budget request. That was because the Joint Budget Committee (JBC) had not yet made any determinations in terms of common policies on salary surveys and merit. Since you approved our budget the JBC did make some decisions regarding salary survey and merit which deviates a little bit from what was built into our budget to begin with. They approved a

1.75% increase for salary survey and a .75% increase for merit increases. Now the interesting part is that those numbers total 2.5% so the bottom line of our budget has not changed, but we have adjusted our budget with direction from both your permission as well as the Executive Committee to incorporate into our budget the common policies adopted by the JBC. It didn't change our bottom line, but it now includes funding for both salary survey and merit increases. The other thing is that the legislative appropriation bill was signed by the governor yesterday.

Senator Kagan said I'm just interested and I should know this but I don't so I'm just going to ask. The .75% that is allocated for merit pay increases, presumably not everybody gets a merit pay increase because not everybody is meritorious or equally meritorious, so do some people get more than .75% and some people get less than .75% if they are less meritorious? If not, than you'd think you'd need less if some people get .75% and no more and some people don't get the .75% because they are not meritorious, they haven't showed up for work for the last 6 months and they've just generally done a terrible job, how does that work? Do some people get more and some less than .75% or do some people get .75% and others not get .75%? Ms. Eubanks said all of the above. Those determinations will be made this summer in terms of awarding any merit increases, but the potential exists that some folks may not get any additional money for merit, some may get more than .75%, and some may be in between. The fact that this amount is included in the budget for merit doesn't mean that it's across the board and everyone will get it. It'll get spent for merit; that's just sort of the placeholder, the amount of funding that's there potentially for merit. But no, it doesn't mean that everybody gets .75%. It's on a case by case basis, based on merit.

The House members returned from the House floor and the Committee again had a quorum so the Committee returned to agenda item 1. a. for a vote.

1:07 p.m.

Hearing no discussion or testimony, Senator Kagan moved to extend Rules 4204-R-2.02(d), 4204-R-5.01(a), 4204-R-5.02(c), 4204-R-6.02(b), 4204-R-11.12, and 4204-R-16.02; Rule 4204-R-15.03(e); Rule 4204-R-18.01; and Rule 4204-R-17.00, including Rules 4204-R-17.01 to 17.14, of the rules of the state board of education and asked for a no vote. Representative Foote seconded the motion. The motion failed on a vote of 0-7 with Senator Gardner, Senator Guzman, Representative Herod, Senator Holbert, Senator Kagan, Representative Foote, and Senator Cooke voting no. The rules were not extended.

1:11 p.m. – The Committee addressed agenda item 3 - Approval of SB 17-083 by Senator Kagan; also Representative Foote - Rule Review Bill.

Representative Foote said as was indicated we are sitting here as the committee of reference for the House now that this bill is out of the Senate due to the able leadership of Senator Kagan. We will presumably be taking it up in the House if it passes this Committee. You all know the Rule Review Bill. It strikes certain rules that we have decided that should be not extended during the discussions of this Committee and so of course I'll ask for an aye vote and let you know there are a couple of amendments that will be making their way through and I'll ask for an aye vote on those amendments as well.

1:12 p.m.

Representative Foote moved amendment L.002. Senator Kagan seconded the motion. Representative Foote said L.002 should be fresh in you minds because this is what we just talked about. These are the state board of education rules that we just voted not to extend and so we would like to amend them into the Rule Review Bill to make sure that they don't get extended. I ask for an aye vote. Seeing no further discussion, no objections were raised to that motion and it passed unanimously.

1:13 p.m.

Representative Foote moved amendment L.003. Senator Kagan seconded the motion. Representative Foote said L.003 deals with rules from the department of revenue for electronic transfer of funds. This was a bill that I ran in the House. I think Senator Gardner was the Senate sponsor. That bill has passed both the House and the Senate and it is law. You may recall if you were in these discussions last year that these were rules that were found by the Committee to not fit under the statute at the time. We ran and passed a bill to make sure the statute would achieve the policy we wanted to achieve and that has become law. At this point we can take out the fact that we're striking these rules. Seeing no further discussion, no objections were raised to that motion and it passed unanimously.

1:14 p.m.

Hearing no further discussion or testimony, Representative Foote moved to refer Senate Bill 17-083, as amended, to the Committee of the Whole. Senator Kagan seconded the motion. The motion passed on a vote of 8-0 with Senator Gardner, Senator Guzman, Representative Herod, Senator Holbert, Senator

Kagan, Representative Wist, Representative Foote, and Senator Cooke voting yes.

1:17 p.m. – Jennifer Gilroy, Revisor of Statutes, Office of Legislative Legal Services, addressed agenda item 3 - Approval of Introduction of and Sponsors for a Committee bill on Statutory Paper Specifications for Publication of the Colorado Revised Statutes.

Ms. Gilroy said I think I've had an opportunity to speak to all of you individually about this agenda item, but just as a brief refresher I wanted to remind you that this has to do with the statutory requirement of the type of paper that is used when we publish the C.R.S. It's set up by an American National Standards Institute (ANSI) specification and the Statutory Revision Committee (SRC) had updated an ANSI standard having to do with accessible housing which made me think wonder if our paper standards have changed as well and indeed they had. I asked Nate Carr in our Office to do a little bit of research and investigation and he found the following. First of all, we cite the standard wrong in the statute to start out with, but second of all it's way outdated. In fact, it was last updated about eight years ago. We really do need to update the standard in section 2-5-105.5, C.R.S. I did a little further research on my own and found out the kind of characteristics of paper that need to be updated and of most interest to us is the acidity level of paper because a lot of acid in the paper causes it to start turning yellow and becoming brittle and eventually deteriorating over time. While these are recyclable books, I actually archive sets of them for historical purposes so I want to make sure they don't completely disintegrate and become lost. I do have some interest in that, but I'm not so interested in the tear strength which is one of the factors that they test that's important for envelopes or boxes or what have you, so I'm not worried about that. My recommendation is that we update the standard and we focus in on the alkaline and acidity standards of the ANSI standard. I have provided each of you with an unofficial draft of what the bill would look like. The gist of it is on the back of that one page bill. I would ask that the Committee consider sponsoring a committee bill to update that standard and really would like to see it done this session and the reason for that is because you may or may not know, this Committee approved and extension of our current publication contract for another five years and I have drafted that extension and I've circulated it. The attorneys at LexisNexis have approved it, the Attorney General's office has approved it, our state controller has approved it, and in fact our contract refers to this very statutory standard so I want to make sure it's correct and I want it to be in place in statute the right way. That's why I'm really motivated to do it this session. I ask that this Committee consider sponsoring such legislation.

Representative Wist said just to anticipate a question coming from our colleagues, in the digital era why do we care what kind of paper the statutes are printed on in the books? Ms. Gilroy said right now our digital version of the statutes is not an official version. Pursuant to statutory language itself, only our print version is an official version. We are actually working with LIS toward a goal of making our digital version an official version, but so far it is not. Once we feel confident that we can assure that it's permanent and authenticated, we will ask to have the statute changed, another bill for this Committee in the future, and make that an official version. Nevertheless, most archive experts recommend you keep a hard copy of your official version as one that can never be mucked with or changed, so that is something we will always do, even when the digital version is official.

1:20 p.m.

Hearing no further discussion or testimony, Senator Kagan moved the Committee on Legal Services recommend introduction of a bill along the lines of the draft that had been presented. Representative Lee seconded the motion. The motion passed on a vote of 9-0 with Senator Gardner, Senator Guzman, Representative Herod, Senator Holbert, Senator Kagan, Representative Lee, Representative Wist, Representative Foote, and Senator Cooke voting yes.

Senator Kagan agreed to sponsor the bill in the Senate and Representative Lee agreed to sponsor the bill in the House.

1:23 p.m.

The Committee adjourned.